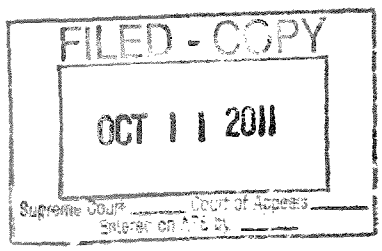
10-11-2011

Idaho Dept. of Health & Welfare v. McCormick Appellant's Reply Brief Dckt. 38694

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF: GEORGE D. PERRY,	)	
IDAHO DEPARTMENT OF HEALTH AND WELFARE,	)	
Petitioner-Appellant,	)	SUPREME COURT NO. 38694
vs.	)	
BARBARA K. MCCORMICK, Personal Representative of the Estate of George D. Perry,	)	
Respondent on Appeal.	)	



APPELLANT'S REPLY BRIEF

APPEAL FROM FOURTH JUDICIAL DISTRICT, ADA COUNTY

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I.

POWER OF ATTORNEY

The personal representative argues, for the first time, that the Quitclaim Deed used by George Perry to convey Martha's real property to himself (R. p. 99), was not a gift. Respondent's Brief, p. 34. She points to the fact that the parties agreed no evidentiary hearing was necessary and the deed was in the record. Respondent's Brief, p. 36. However, that agreement was made after both parties had briefed the issues and no claim had been made that the transfer of the property was anything other than a gift. Obviously, had the personal representative made such a claim before Judge Bieter, the Department could have easily offered evidence to refute it by simply calling the personal representative to the stand.

The reality is the personal representative, even here, doesn't claim George actually paid Martha for the property. There is no evidence in the record that George had any money that was his separate property to make such a purchase. Judge Bieter made no findings of fact relating to any such a claim. Indeed, Judge Bieter, like both parties, treated the transfer as the gift it was. Tr. (February 26, 2010) p. 11, ll.8-13. At the same hearing, counsel for the personal representative also treated the transfer as a gift. Tr. (February 26, 2010) p. 9, ll. 4-5. Similarly, the personal representative's entire argument before the District Court, relating to the power of attorney, was based on her claim that the power of attorney authorized gifting. R. pp. 600-2. Finally, the District Court ruled on the "authority to make gifts," not on any claim that consideration had been paid. R. p. 709. The issue set forth by the District Court was, "Whether the magistrate erred in determining that the general power of attorney held by George Perry gave

him authority to make a gift to himself of Martha Perry's real property." R. p. 706. That is the issue the District Court ruled on. R. pp. 707-9.

At no time before the filing of Respondent's Brief in this Court did the personal representative claim the transfer was anything other than a gift, and no finding or conclusion was ever made on any such claim. "It is well established that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error." *Krempasky v. Nez Perce County Planning and Zoning*, 150 Idaho 231, 236, 245 P.3d 983, 988 (2010). "Issues not raised below but raised for the first time on appeal will not be considered or reviewed." *Id.*

In a footnote, the personal representative suggests that inferred spousal agency would also support the gift by George to himself. Respondent's Brief, p. 43, fn. 36. The court below, however, made no findings supporting such a claim, and correctly so; there was an express power of attorney which gave George the power to deal with Martha's property – for Martha's benefit. There was nothing in either the circumstances or the power of attorney which authorized George to take Martha's property and give it to himself.

Finally, the personal representative argues that the power of attorney issue is not dispositive because "on November 18, 2002, Martha executed a deed conveying a ½ interest in the home to her husband George." Respondent's Brief, p. 34, fn. 26. However, that is not how the deed was worded. The deed Martha executed shows the grantor as "Martha Jean Boyle" and the grantee as "Martha Jean Perry & George Donald Perry," and conveys the property from Martha Boyle to Martha Perry and George Perry. R. p. 134. This deed, presumably, made the property the couple's community property. Idaho Code § 32-906. In any event, however, Judge

Bieter made no findings with regard to the characterization of this property, and that issue remains to be decided below.[1]

II.

THERE IS NO CONFLICT BETWEEN IDAHO LAW AND FEDERAL LAW.

A. While Idaho Estate Recovery Law Is Unambiguous, the Federal Law Has Been the Subject of Diverse Interpretations.

As discussed in prior briefing, Idaho law is clear in permitting recovery from the estate of either spouse, so long as the assets are traceable to property that had been community property or the property of the Medicaid recipient. Appellant's Brief, p. 12. 42 U.S.C. § 1396p(b) is equally clear in allowing the states to recover assets transferred from one spouse to the other. Subsection (b)(4)(B) gives the states the option of expanding the definition of "estate," for purposes of Medicaid recovery to

> include, at the option of the State . . . any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

42 U.S.C. § 1396p(b)(4)(B) (underline added). As noted by the personal representative, Idaho adopted this language "verbatim." Respondent's Brief, p. 8. The personal representative is quick to point out that the language refers to "assets in which the individual had any legal title or interest at the time of death," and contends that Martha's assets were conveyed to George.

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[1]The personal representative states that the Department never objected to the characterization of the property in the inventory as separate property. Respondent's Brief, p. 3. However, from the very beginning, the Department challenged the Quitclaim Deed by George to himself, as not eliminating Martha's community interest. R. pp. 127-30. There is nothing in the probate code that requires a more specific challenge to the inventory.

However, this argument ignores the definition of "assets" in 42 U.S.C. § 1396p(h)(1) which explains that the

> . . . term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action –
>
> (A) by the individual or such individual's spouse . . ..

42 U.S.C. § 1396p(h)(1) (underline added). Notice that this defines assets "with respect to an individual." So when section 1396p(b)(4)(B) speaks of "assets in which the individual" had any legal title or interest, it is referring directly to this definition, and includes assets that Martha would have received, but for her own actions or the actions of her spouse.

While this construction seems clear and unambiguous to the Department, as pointed out by the personal representative, some courts, such as the Minnesota Supreme Court in *Estate of Barg*, 752 N.W.2d 52 (Minn. 2008), have had difficulty with it. Admittedly, the *Barg* court did not discuss the definition of "assets" in section 1396p(h), and therefore may not have considered it at all. Likewise, the Solicitor General opinion, cited by the personal representative, argues that the definition of "assets" in section 1396p(h) should not be applied to subsection (b). R. p. 86. To the extent, then, that section 1396p is subject to such diverse, even opposing, interpretations, it is ambiguous.

While the personal representative argues that the federal law is unambiguous (Respondent's Brief, p. 25), she feels it necessary to ask the Court to consider the interpretation of the Solicitor General and asks the court to defer to what she considers the interpretation of the

federal Department of Health and Human Services.[2] Respondent's Brief, pp. 18-9. She further asks the court to consider rules of statutory construction. Respondent's Brief, p. 20, fn. 13 and p. 27. Since such external aids of interpretation and construction would be unnecessary if the law were unambiguous, the personal representative must necessarily agree that the federal statute is ambiguous. It is legitimate, therefore, to examine the legislative intent and the purpose of the law.

B. Congress Intent to Track and Recover Assets Such as Those Here Could Not Be More Clear.

Medicaid has always been intended to be the payer of last resort. *Arkansas Dept. of Health and Human Services v. Ahlborn*, 547 U.S. 268, 291, 126 S.Ct. 1752, 1767 (2006). Congress has consistently sought to counter the attempts of some to use the Medicaid program as an estate planning tool to protect assets for their heirs. The language of the congressional committee, cited by the court in *Cohen v. Commissioner of Div. of Medical Assistance*, 423 Mass. 399, 668 N.E.2d 769 (1996) is often quoted:

> The Committee feels compelled to state the obvious. Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying trusts and similar "techniques" to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable to the Committee.

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[2]The Department does not agree that a brief by the Solicitor General is entitled to deference by this court In *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 212-3, 109 S.Ct. 468, 473-4 (1988), the Supreme Court said:

> We have never applied the principle of those cases [deference to agency interpretations] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands."

(underline added).

H.R.Rep. No. 265, 99th Cong., 1st Sess., pt. 1, at 72 (1985).

Cohen, 423 Mass. at 403-4, 668 N.E.2d at 772. The 1988 committee report for the Medicare Catastrophic Coverage Act (MCCA) echoed these same concerns:

> The Committee is informed that a number of States have not made effective use of the authorities under current law to prevent affluent individuals from disposing of resources in order to qualify for Medicaid nursing home coverage. In the view of the Committee, Medicaid—an entitlement program for the poor—should not facilitate the transfer of accumulated wealth from nursing home patients to their non-dependent children.

H.R. Rep. No. 105(II), 100th Cong., 1ST Sess. 1987, p. 73 (reprinted at 1988 U.S.C.C.A.N. 857, 896, 1987 WL 61566, p. 31) (underline added).

OBRA '93, discussed by the personal representative (Respondent's Brief, p. 5), included provisions which expanded the powers of the states to recover Medicaid benefits. The intent of OBRA '93 to track and recover assets not counted when determining eligibility, including those transferred to the spouse, is clear:

> Under the Committee bill, States are required to establish an estate recovery program that meets certain requirements. **The program must identify and track resources (whether or not excluded for eligibility purposes)** of individuals who receive nursing facility, home and community-based services, and other specified long-term care services. The program must promptly ascertain when the individual and the surviving spouse, if any, dies, and must provide for the collection of the amounts correctly paid by Medicaid on behalf of the individual for long-term care services **from the estate of the individual or the surviving spouse**. The term "estate" is defined as all real and personal property of a deceased individual and all other assets in which the individual had any legally cognizable title or interest at the time of his death, including assets conveyed to a survivor, heir, or assign through joint tenancy, survivorship, life estate, living trust, or other arrangement.

H.R. Rep. 103-111, P.L. 103-66, OBRA 1993 (May 25, 1993), Section 5112. (emphasis added).

Congress's attempts to strengthen recovery of assets such as those here has not ceased. In 2006

the president signed the Deficit Reduction Act of 2005 giving the states additional tools to assure couple's assets will be used for their own care or will be available for recovery, rather than being protected for their heirs. The DRA included enhanced asset transfer penalties and restrictions on annuities not directly in issue here.

C. The Expanded Definition of "Estate" Is More than Sufficient to Reach the Assets Here.

The expanded definition of estate is, by its own terms, meant to be very broad. It uses words such as "include" and "including," and phrases such as "any other . . . property and other assets," and "or other arrangement." 42 U.S.C. § 1396p(b)(4)(B). The term "assets" which is incorporated into this subsection, is also defined very broadly using phrases such as "includes all income and resources of the individual and of the individual's spouse" and includes income and resources the individual does not receive because of action by herself or by her spouse. 42 U.S.C. § 1396p(h)(1).

The personal representative attempts to unnecessarily narrow this definition, arguing that because there is a list of several transfers that occur automatically on death, only automatically-on-death transfers are included. This distinction, however, is not found anywhere in the law. Even among the listed transfers, not all occur at the moment of death. For example, when a living trust is created the legal title is passed immediately. *Estate of Hull v. Williams*, 126 Idaho 437, 443, 885 P.2d 1153, 1159 (App. 1994). The beneficiary holds only the beneficial, not legal, interest, and no legal interest passes on death.

This also demonstrates that it is not necessary that the Medicaid recipient be the legal owner of the property at the time of death. The words used by the statute are "legal title or interest." Such an interest may be legal, equitable, or beneficial. Since the expanded definition

of estate includes the "resources of the individual and of the individual's spouse" and also includes any "resources which the individual . . . does not receive because of action . . . by the individual or such individual's spouse," Martha, by definition, had an interest in the couple's home whether or not it was transferred to George.

This is the reasoning used by the North Dakota Supreme Court in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000):

> Our inquiry, therefore, is narrowed to whether Clarence Wirtz had "real and personal property and other assets in which [he] had any legal title or interest at the time of death, including such assets conveyed" to Verna Wirtz through "other arrangement."
>
> Under 42 U.S.C. § 1396p(e)(1), asset is defined as:
> (1) The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action-
> (A) by the individual or such individual's spouse,
> (B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or
> (C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.
>
> *See* Idaho *Department of Health and Welfare v. Jackman*, 132 Idaho 213, 970 P.2d 6, 9 (Id.1998) (concluding the definition does not apply to assets disposed of on or before August 10, 1993).
>
> Thus, the department can assert a claim against real or personal property, and other assets in which Clarence Wirtz had any legal title or other interest at his death, including income and assets conveyed through "other arrangement."

Wirtz, 607 N.W.2d at 885 (underline added). The North Dakota Supreme Court then went on to decide what the terms "interest" and "other arrangement" mean in the federal statute and concluded:

> We conclude consideration of all the relevant statutory provisions, in light of the Congressional purpose to provide medical care for the needy, reveals a legislative intention *to allow states to trace the assets of recipients of medical*

assistance and recover the benefits paid when the recipient's surviving spouse dies.

We hold any assets conveyed by Clarence Wirtz to Verna Wirtz before Clarence Wirtz's death and traceable to her estate are subject to the department's recovery claim. However, the recoverable assets do not include all property ever held by either party during the marriage. *Cf. Estate of Jobe*, 590 N.W.2d 162, 166 (Minn.Ct.App.1999). 42 U.S.C. § 1396p(b) contemplates only that assets in which the deceased recipient once held an interest will be traced. It does not provide that separately owned assets in the survivor's estate, or assets in which the deceased recipient never held an interest, are subject to the department's claim for recovery.

Wirtz, 607 N.W.2d at 886 (italics in original; underline added).[3]

D. Recovery Here Is Not an Obstacle to the Purposes of the Federal Law.

As stated by the personal representative:

Conflict preemption occurs when compliance with both state and federal laws is impossible. *Fla. Lime Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143,83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). Conflict preemption also occurs when the state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

Respondent's Brief, p.12. As noted above, however, the purpose of the law is to trace assets, including those not counted in determining eligibility,[4] and recover those assets after the death of both spouses. There is nothing, either in the law or the legislative history, that suggests any intention to preserve assets for the couple's non-dependent children. There is nothing in Idaho

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[3]The Solicitor General amicus brief, cited by the personal representative does not disagree with *Wirtz*:

The different results reached by the North Dakota Supreme Court and the court below on similar facts thus may reflect not conflicting interpretations of federal Medicaid law, but only different views of when, under state law, a spouse retains a legal interest in property conveyed to his or her spouse.

Solicitor General brief, p. 14 (R. p. 90). The Solicitor General does not mention the obvious fact that the *Wirtz* court considered the definition of "asset" in section 1396p and the *Barg* court did not.

[4]The personal representative acknowledges that the couple's home is not a countable resource in determining eligibility. Respondent's Brief, p. 4, fn. 2.

Code § 56-218 that presents "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

On the other hand, interpreting the federal law as demanded by the personal representative has perverse consequences. For example, Medicaid payments intended to ease the burden on elderly couples become, instead, a windfall to their heirs. Unmarried Medicaid recipients are placed at a disadvantage to married couples because a married Medicaid recipient may pass her property to her heirs while an unmarried Medicaid recipient's assets must be used to repay Medicaid. Unsophisticated couples who do not seek legal advice will leave nothing to their heirs, while those who consult an attorney will convey their assets to the non-Medicaid spouse and entirely avoid recovery. No, the purposes of both State and federal laws are met only if the federal law is read to give purpose and meaning to the expanded definition of estate.

III.

ATTORNEY FEES

The personal representative seeks attorney fees on appeal contending that there is no reasonable basis in fact or law to support the Department's claim. Even, however, should the court find in favor of the personal representative, attorney fees would not be appropriate. Idaho Code § 56-218 clearly permits the recovery sought here. If the federal law does not also clearly permit the recovery, then it is, at best, ambiguous and the Department is not acting unreasonably in giving it the same interpretation given by other courts including the North Dakota Supreme Court in *Wirtz*.[5]

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[5]The Missouri Court of Appeals also gives the law the same meaning in *In re Estate of Bruce*, 260 S.W.3d 398 (Mo.App. 2008), where the court held that Missouri could not recover from the estate of the spouse only because it had not adopted the expanded definition of estate.

In *Ralph Naylor Farms, LLC v. Latah County*, 144 Idaho 806, 172 P.3d 1081 (2007), the court explained that "if an agency's actions are based upon a 'reasonable, but erroneous interpretation of an ambiguous statute,' then attorney fees should not be awarded." *Ralph Naylor Farms, LLC*, 144 Idaho at 809, 172 P.3d at 1084; *accord Matter of Russet Valley Produce, Inc.*, 127 Idaho 654, 661, 904 P.2d 566, 573 (1995).

Similarly, the Idaho Supreme Court has repeatedly held that where the issue is a matter of first impression, or other states have conflicting case-law, attorney fees should not be awarded under Idaho Code § 12-117. *Smith v. Idaho Dept. of Labor*, 148 Idaho 72, ___, 218 P.3d 1133, 1137 (2009); *see also Saint Alphonsus Regional Medical Center v. Ada County*, 146 Idaho 862, 863, 204 P.3d 502, 503 (2009) ("Because the issue of standing presented a question of first impression under the amended statutes, we conclude that Ada County did not act without a reasonable basis in law"); *Kootenai Medical Center ex rel. Teresa K. v. Idaho Dept. of of Health and Welfare*, 147 Idaho 872, 886, 216 P.3d 630, 644 (2009) (attorney fees on appeal declined where the case involved issues of first impression in an Idaho appellate court); *State, Dept. of Finance v. Resource Service Co., Inc.*, 134 Idaho 282, 285, 1 P.3d 783, 786 (2000) ("based upon the lack of case law of this state in addition to supporting decisions from other jurisdictions, that the Department was not without a reasonable basis in fact or law in bringing and maintaining suit").

There is more than a reasonable basis for the Department's claim for recovery in this matter.

IV.

CONCLUSION

The power of attorney used by George to convey Martha's property to himself contained no authority for self dealing or making gifts and was insufficient to support the purported transfer to himself. There is no conflict between Idaho Code § 56-218 and federal Medicaid law. The order of the Magistrate disallowing the Department's claim should be reversed and the Department's claim should be allowed for payment according to its priority under the probate code.

DATED this 11 day of October, 2011,

W. COREY CARTWRIGHT
Deputy Attorney General

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing document were mailed, postage pre-paid, to the following:

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